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IN THE SUPREME COURT OF THE UNITED STATES

JAMES L. MURPHY

Petitioner

Vs. Case No. 79-1045

OWENS-CORNING FIBERGLAS CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI

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INDEX

Table of Cases	i
Table of Statutes	ii
Petition for Writ of Certiorari	1
Lower Courts	1
Questions Presented for Review	2
Relevant Statutes	3
Statement of the Case	11
Arguments and Authorities	31
Conclusion	60
Appendix	
Memorandum and Order; Murphy v. Owens-Corning Fiberglas Corp. (U.S. Dist. Court for the Dist. of KS)	A-1
Majority Opinion Murphy v. Owens-Corning Fiberglas Corp. Tenth Circuit Court of Appeals	A-67
Dissenting Opinion of Judge Holloway	A-79
Denial of Petition for a Rehearing (Tenth Circuit Court of Appeals)	A-88

TABLE OF CASES

Brach, Sivalls, and Bryson, Inc. v. Keystone Steel Fabrication, Inc., 584 F.2d 946 (10th Cir.)	35
In Re Millar's Estate 185 Kan. 510; 345 P.2d 1033, (1959)	60
In Re Robert's Estate 192 Kan. 91, 386 P.2d 301 (1963)	60
James Baird Co. v. Boyd 41 F.2d 578, 582	49
Matter of Carothers' Estate 220 Kan. 437 552 P.2d 1354 (1976)	60
Miller v. Beech Aircraft Corp., 204 Kan. 184, 460 P.2d 535 at 538 (1960)	58,59
Texas and Pacific Ry. Co. v. Behymer, 189 U.S. 468, 470, 23 S.Ct. 622	49
Walker v. Colgate-Palmolive-Peet Co. 157 Kan. 170, 139 P.2d 157	48,50,57
Weeks v. Latter-Day Saints Hospital 418 F.2d 1035 (10th Cir.)	35
Wright v. American Home Assurance Co. 488 F.2d 361 (10th Cir.)	35

TABLE OF STATUTES

K.S.A. 44-5a01	4-8,32-33
K.S.A. 44-5a02 (Formerly G.S. 44-5a02)	8-11, 33,34
Seventh Amendment to the U.S. Constitution	3-4, 45
29 USC § 1254	2

PETITION FOR WRIT OF CERTIORARI

Comes now the petitioner and petitions this honorable Court for a Writ of Certiorari. In accordance with Rule 23 of the United States Supreme Court, petitioner submits the following:

LOWER COURTS

This petition for Writ of Certiorari is from the decision of the 10th Circuit Court of Appeals, denying plaintiff's petition for a rehearing and affirming the decision of the United States District Court for the District of Kansas.

The judgment of the Court of Appeals was entered on the 13th day of July, 1979. The dissenting opinion of Judge Holloway was filed on the 17th day of August, 1979. Due to the fact that the dissenting opinion was filed more than

a month after the decision of the Court, petitioner timely requested and was granted an additional 14 days after the filing of the dissenting opinion to file a petition for rehearing. Said petition was timely filed on August 31, 1979, with suggestions for rehearing en banc, and denied on the 5th day of October, 1979. The mandate of the Court of Appeals was issued on the 15th day of October, 1979.

The jurisdiction of the Supreme Court to review the judgment of the Court of Appeals is based on 29 USC §1254.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

1. Did the Court of Appeals err in concluding that the presence of ammonia as a contributing factor to plaintiff's injury brought this case within the para-

meters of the Kansas Workers' Compensation Law?

2. Did the Court of Appeals err in failing to view the evidence in the light most favorable to plaintiff and therefore deny plaintiff his right to a trial by jury in contravention of the Seventh Amendment to the Constitution of the United States?

3. Did the Court of Appeals err in concluding that proof of compliance with an industry standard was conclusive as to proof of due care and that plaintiff could not prove his case without expert opinion or proof of violation of an industry standard?

RELEVANT STATUTES

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury

shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII

44-5a01. Occupational disease as injury by accident, when; provisions of workmen's compensation law applicable. (a) Where the employer and employee or workman are subject by law or election to the provisions of the workmen's compensation law, the disablement or death of an employee or workman resulting from an occupational disease as hereinafter listed and defined shall be treated as the happening of an injury by accident, and the employee or workman or, in case of death, his dependents shall be entitled to compensation as provided in the workmen's

compensation law except as hereinafter otherwise provided; and the practice and procedure prescribed in such law shall apply to all proceedings under this act, except as hereinafter otherwise provided: Provided, however, That in no case shall an employer be liable for compensation under the provisions of this act except for an occupational disease specified in section 44-5a02 of the General Statutes Supplement of 1961 and unless such disease has resulted from the nature of the employment in which the employee or workman was engaged under such employer and was actually contracted while so engaged, meaning by "nature of the employment" that to the occupation in which the employee or workman was so engaged there is attached a particular hazard of such disease that distinguishes it from the usual run

of occupations and is in excess of the hazard of such disease attending employment in general; and unless disablement results within one year or death results within three (3) years in case of silicosis, or one (1) year in case of any other occupational disease, after the last injurious exposure to the hazard of such disease in such employment, or, in case of death, unless death follows continuous disability from such disease, commencing within the period above limited, for which compensation has been paid or awarded or timely claim made as provided in this act, and results within seven (7) years after such last exposure. Where payments have been mnade on account of any disablement from which death shall thereafter result such payments shall be deducted from the amount of liability provided by law in

case of death. The time limit prescribed by this section shall not apply in the case of an employee whose disablement or death is due to occupational exposure to ionizing radiation.

(b) Where an occupational disease is aggravated by any other disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, but is aggravated, prologned, accelerated or in any wise contributed to by an occupational disease, the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease, as a causative factor, bears to all the causes of such disability or death, such reduction

in compensation to be effected by reducing the number of weekly or monthly payments or the amounts of such payments, as under the circumstances of the particular case may be for the best interest of the claimant or claimants.

(c) No compensation for death from an occupational disease shall be payable to any person whose relationship to the deceased employee or workman arose subsequent to the beginning of the first compensable disability save only to afterborn children.

(d) The provisions of section 44-570 of the workmen's compensation law shall apply in case of an occupational disease. [L. 1963, ch. 274, §1; June 30.]

44-5a02 Compensable occupational diseases. The following diseases only shall

be deemed to be compensable occupational diseases:

1. Poisoning by (a) aluminum; (b) arsenic; (c) beonzol or its homologues, or the derivatives of benzol, or the derivatives of homologues of benzol; (d) beryllium; (e) cadmium; (f) carbon bisulphide or hydrogen sulphides; (g) carbon monoxide; (h) chromic acid and chromates; (i) cyanide; (j) formaldeyhyde; (k) fluorine, flouride and hydrofluroic acid; (l) halogenated hydrocarbons; (m) lead; (n) manganese; (o) mercury; (p) methanol; (q) nitroglycerine; (r) oxides of nitrogen; (s) yellow phosphorus; (t) sulphur; (u) zinc.

2. Anthrax caused by handling of wool, hair, bristles, hides or skins.

3. Blisters caused by prlonged or repeated use of tools or mechanical appli-

ances: Provided, That no compensation shall be payable unless the workman shall promptly, and not later than the end of the shift during which such blister first develops, report the same to his employer, or designated agent of such employer and submits to such medical treatment therefor as shall be required and furnished by the employer.

4. Brucellosis (undulant fever): Provided, That such disease shall be limited to those individuals employed in milk plants, packing plants, butcher shops or rendering plants.

5. Compressed air illness.

6. Conjunctivitis.

7. Dermatitis, that is, inflamation or infection of the skin due to oils, cutting compounds or lubricants, dust, liquids, fumes, gases, vapors, or solids.

8. Diseased condition caused by exposure to X-rays or radioactive substances, or exposure to ionizing radiation. "Ionizing radiation" means any process involving the use or direct contact with radium or radioactive substances or the use of or direct exposure to roentgen rays (X-rays) or ionizing radiation.

9. Erysipeloid - swine erysipelas.

10. Nystagmus incurred in underground work.

11. Synovitis, tenosynovitis or bursitis the result of repeated pressure, friction or over use.

12. Silicosis, as hereinafter defined. [L. 1959, ch. 222, §1; June 30].

STATEMENT OF THE CASE

A brief statement of the facts of this case is next to impossible due to the

nature of the questions presented. The main issues in this appeal turns on the conclusions which can be drawn from the facts, all as more completely set forth hereinafter.

This is an action filed in the District Court of Wyandotte County, Kansas, and subsequently removed to the United States District Court for the District of Kansas, seeking damages for personal injury to an employee as a result of the employer's negligence in failing to maintain a safe place to work. Plaintiff is a citizen of Kansas and defendant is a Delaware Corporation with principal offices in Toledo, Ohio. The amount in controversy exceeds Ten Thousand Dollars.

Folllowing a five day jury trial, a verdict was returned for the plaintiff in the sum of Two Hundred Seventy-five Thou-

sand Dollars ($275,000.00) and judgment was entered thereon on March 28, 1977. The trial court, on December 6, 1977, granted defendant's motion for judgment notwithstanding the verdict and conditionally granted defendant a new trial. Plaintiff filed timely notice of appeal from this ruling. The 10th Circuit Court of Appeals affirmed the judgment of the lower court in a two to one decision. Plaintiff's timely petition for a rehearing was also denied by a split decision.

Appellant applied for work with the defendant at its Kansas City, Kansas, plant in 1959. Plaintiff was in perfect health at the time of his employment. When plaintiff first applied for work with defendant, he noticed "stuff" all floating through the air inside defendant's plant. The material could readily

be seen when the sun was shining in the windows. Plaintiff inquired as to the safety of the material in the air and was told that it was dirty, but that it would not hurt you.

At the end of one weeks employment, plaintiff became a fabrication processer on the "burr line", where he worked from 1959 to 1964. On the burr line, plaintiff fed rolls of untreated fiberglas mats into machinery. As the fiberglas mats would unwind into the burr machine, glass material would shoot into the air from the mats. At the point where plaintiff worked, gritty material would pile up on the floor to a considerable depth. At the end of a work day, plaintiff's clothes were dirty and dusty to such an extent that they could not be washed with the rest of the family's clothes.

Plaintiff testified that he never noticed any ventilation near the burr line.

Plaintiff complained that the fiberglas dust made him cough and asked to be transferred. However, his supervisor informed him that his complaints were just his imagination and that no harm would come to him from the glassy material. Between 1959 and 1965, plaintiff developed a slight cough and would break out with a rash from the fiberglas. Dr. Sifers, the plant physician, diagnosed him as having sinus drainage with a cough and sent him to have a chest x-ray.

In 1964, plaintiff finally withdrew from the burr line and began working as a handyman wool packer. He would pull finished fiberglas from the production line and prepare it for shipping. His work area was characterized as having dust and dirt floating around in the air and fiberglas piling up and hanging over the beams

of the plant ceiling and "generally everything".

After two months as a wool packer, plaintiff became an AF operator and worked in the J-3 forehearth area. He was employed in this area from 1965 through 1967. The J-3 forehearth is a partially enclosed, 18 ft. by 25 ft. area, where molten glass is spun into fibers and sprayed with a chemical binder. The forehearth is an elevated platform bounded on the west by an enclosed air-conditioned instrument room, on the north by a blast furnace, on south by a partition going half way to the ceiling, on the east by the forming duct (a pit 8 or 9 ft. below the forehearth floor with a waist high barrier along the edge of the pit) and above by a maze of pipes about $6\frac{1}{2}$ ft. above the floor of the forehearth. Above

the forming duct, are seven hollow cylinders into which the molten glass from the blast furnace runs. Inside the cylinders were spinners, a platinum bushing with many small outlets through which molten glass flowed, which when revolved at high speed changed the molten glass into fibers of glass. The fibers of glass were then sprayed with a chemical binder causing them to clump together. After being sprayed with the binder, the raw fiberglas would then fall onto a conveyor and be transported to the ovens to be cured. Not all the fiberglas coming out of the spinner would be sprayed with binder, but instead would fly out into the forehearth area through the gap between the bottom of the cylinder and the binder ring.

Plaintiff's duties included changing the spinners when they became worn and he

would change as many as 25 to 30 spinners in the course of an 8 hour shift. In addition, plaintiff periodically ran a pull check by pulling out a ladle and checking how much molten glass flowed through the spinner in a 5 minute period. Further, he controlled the amount of binder being sprayed onto the fiberglas and was required to clean up the area and wash the floor down.

The furnace adjacent to the forehearth area produced a temperature of 2200° F. The temperature of the forehearth area in which plaintiff worked averaged about 140° F and ranged as high as 170° F in hot weather. There was glass and dust particles all over the forehearth area. The conditions were such that plaintiff was required to clean the dust off his safety glasses all the time

he was in the forehearth. When cleaning the area, he would use an air hose to blow the glass dust off the overhead pipes and it would fall down on his head as he worked. After each shift, plaintiff would blow dust out of his nose.

Chemical vapors were present in the forehearth almost constantly and would burn plaintiff's nose, mouth, throat, and eyes. Because the safety glasses he was furnished had no rubber moldings, the fumes would irritate his eyes so much that he could not see at times. The chemical odors would be stronger when the wind outside was from the north or west. The fans underneath the forming duct drew the irritating fumes directly across the forehearth were plaintiff worked. The chemical vapors came from the binder room which was northwest of the forehearth.

After a typical shift in the forehearth, plaintiff would break out with a rash on his arms, his eyes would water, his nose would start to run, he would blow salt and pepper-like stuff from his nose, and he would be coughing up sputum containing dust particles and would be gagging from chemical irritation.

Plaintiff continued to complain about the conditions in the forehearth and was once again assured that the dust fumes were harmless.

The only source of ventilation in the forehearth, other than the fans under the forming duct, which merely served to aggravate his condition due to their propensity to draw irritating chemical vapors directly across his work area, was a louver in the roof overhead. These louvers were above the maze of pipework in

the forehearth and would be closed in rain or inclement weather.

The defendant began testing for industrial health hazards in its plant in 1962 and began making tests specifically for fiberglas dust in 1964. During the period that plaintiff worked in the forehearth area, no testing was conducted for chemical vapors, fiberglas dust, or any other type of industrial health hazard.

In 1967, plaintiff was removed from the forehearth area and became a downstairs operator. As such, he was responsible for obtaining as much production as possible from the J-4 line. He would adjust the saws and the height of the oven in order to produce the desired product. In addition, he was constantly returning to the forehearth area to assist in replacing spinners and to check the quality of raw fiberglas.

As a downstairs operator, he was exposed to fiberglas particles from the dust from the saws and the choppers on the production line. The dust was suspended in the air and would accumulate in the plant requiring continual clean-up. In addition, the ovens in which the raw fiberglas was cured would overheat and cause fiberglas fires. A fire would occur almost daily, and smoke from the fires would permeate the plant to such an extent that plaintiff could not see the other end of the plant. Plaintiff would extinguish the oven fires by going through the thick smoke and opening valves located next to the smoking oven. Plaintiff was not provided with a safety mask when performing this task.

Defendant's safety director testified that 10 rows of windows 3 ft. wide and

150 to 200 ft. long were the primary source of ventilation in the production area. The windows would be closed because of snow or inclement weather. Plaintiff, however, stated that he had never noticed the windows being open and had heard that they were welded shut, except for those that had been broken out following an oven fire. Plaintiff testified that the only source of ventilation he was aware of were the doors in the rear of the building. In January, 1968, an industrial hygienist for the defendant noted that there was a lack of make-up air in the plant because of the reliance upon the door openings for ventilation. The only system for pulling air out of the production area were the small exhaust fans attached to the ovens, vented through the roof. These were inadequate for removing

smoke from oven fires. Pedestal fans located along the production line did not improve the situation, but merely served to keep fiberglas particles suspended in the air.

During the period of 1967 to 1970, plaintiff worked at various other jobs in the plant as the production force was temporarily cut back. After his return to work in 1970, Murphy returned to the forehearth as a downstairs operator. The "ammonia compressor" was leaking noticable quantities of ammonia vapor into the atmosphere on the ground floor of the binder room. The ammonia vapor was sufficient to cause eye irritation indicating a concentration of 75ppm. No test sampling was actually done at this time or at the next test in September, 1969. Finally, in March, 1970, a sampling for ammonia vapor was taken. As a result of this test, the defendant was advised that the ammonia pump in the binder room was leaking excessive quantities of ammonia fumes and should be repaired. There was medical testimony that ammonia has a strong odor and is capable of irritating the mucus membranes of the eyes, nose, throat, and lungs. Ammonia vapors will cause eyes to water and the nose to run. Plaintiff stated that the bad odor would come from the north and west from the direction of the binder room, and that it would burn his eyes, nose, mouth, and throat when he worked in the forehearth of the J and K lines. The doors in the rear of the plant (used for ventilation) were near the binder room and the wind would blow the vapors in the direction of his work area.

In July, 1968, defendant's special hazards study found that fiberglas dust was in excess of the recommended level and that defendant was advised to take steps to control fiberglas dust. The January, 1969, study found that when the ventilation was down in the reconditioning area, the concentration of fiberglas was in excess of the recommended levels. The September, 1969, study found that the concentration of fiberglas dust was in excess of the recommended level in two places. The reconditioning area was again found to be above the recommended level and the saws on the 70 line also produced excess exposure. The defendant was advised to enclose the open conveyor line carrying fiberglas waste across the J and K production lines to the reconditioning area. No tests for fiberglas were taken at the

cutter station where the J-4 production line saws were located during the period 1967 to 1970.

From 1967 through November, 1969, plaintiff continued coughing and expectorating sputum. In November, 1969, plaintiff began having chest pains and reported to defendant's medical center where he was sent to see a doctor and to be X-rayed. Plaintiff again received assurances that there was nothing physically wrong with him and was given no medical directions. From November, 1969, through August,1970, plaintiff continued to have chest pains and grew weaker. By August, 1970, plaintiff was coughing more and more and had developed shortness of breath and choking, and generally was unable to get a "good breath". Plaintiff's coughing was so severe that he passed out

in the summer of 1970 and would sit on the railings of the plant to rest and catch his breath. His coughing would abate after being away from the plant for a five day period.

Plaintiff again went to the plant physician, Dr. Sifers, in August of 1970, complaining of severe chest pains. He was X-rayed again and informed that there was nothing physically wrong with him. A pulmonary function machine, a spirometer, was available to defendant's medical center, but plaintiff was never checked on the machine while employed.

In October of 1970, at age 39, as plaintiff was preparing to go to work, he had a severe coughing attack and was unable to get his breath to such an extent that his wife thought he was having a

heart attack. At that point, she took plaintiff to her private physician, Dr. Evans, who hospitalized him two days later. Plaintiff's stay in the hospital lasted three weeks at which time he was advised by Dr. Evans that if he did not leave the defendant's plant, he would be dead and that he should stay away from foreign particles in order to avoid causing further damage to his lungs. Plaintiff was diagnosed as having chronic obstructive lung disease, pulmonary fibrosis, pulmonary yeast infection, and chronic sinusitis.

The recommended guidelines for fiberglas exposure contained in defendant's hygienic reports contained the following warning:

> "Because of wide variation of individual susceptibilitiy, exposure at or even below the threshold limit value may not prevent discomfort, aggravation of pre-existing condition, or occupational disease. The TLV should be used as a guide in the control of health hazards and should not be regarded as fine lines between safe and dangerous conditions."

Despite this warning, plaintiff's pattern for testing its facility was haphazard at most. Despite the fact that plaintiff had made complaints of the working conditions in the forehearth area, no test for fiberglas was ever made in that area. Further, there was no established practice governing the frequency of testing. Defendant's employees stated testing was done on the basis of complaints, yet despite this criterion, if you will, no test was ever conducted in

plaintiff's work area. Furthermore, there was testimony that testing was conducted only on clean days and defendant's own surveys on more than one occassion note that as many as 3 lines were closed on the day of testing.

Again, despite the above warning and the studies, defendant never provided plaintiff with a mask or with individual monitoring devices despite the fact of their availability.

ARGUMENTS AND AUTHORITIES

1. DID THE COURT OF APPEALS ERR IN CONCLUDING THAT THE PRESENCE OF AMMONIA AS A CONTRIBUTING FACTOR TO PLAINTIFF'S INJURY BRINGS THIS CASE WITHIN THE PARAMETERS OF THE KANSAS WORKMEN'S COMPENSATION LAW?

A majority of the 10th Circuit Court of Appeals concluded that the presence of ammonia as a contributing factor to plain-

tiff's injury brought this matter within the parameters of the Kansas Workmen's Compensation Act and therefore, plaintiff could not bring an action based on common law negligence. The evidence is clear that ammonia vapors were excessive in defendant's plant. And plaintiff's physician testified that ammonia vapors were a contributing factor to his condition.

Plaintiff last worked at defendant's plant in October, 1970. On that date, the Kansas Workmen's Compensation Act applied only to injuries received as a result of certain "covered chemicals". K.S.A. 44-5a01 (previously quoted at length herein) provides in relevant part as follows:

> "Provided, however, That in no case shall an employer be liable for compensation under the provisions of this act except for an occupational

> disease specified in section 44-5a02 of the General Statutes Supplement of 1961 and unless such disease has resulted from the nature of the employment in which the employee or workman was engaged under such employer and was actually contracted while so engaged, meaning by 'nature of employment' that to the occupation in which the employee or workman was so engaged there is attached a particular hazard of such disease that distinguishes it from the usual run of occupations and is in excess of the hazard of such disease attending employment in general;"
> (Emphasis added)

§44-5a02 of the General Statutes of 1961 states as follows in relevant part:

> "The following diseases only shall be deemed to be compensable occupational diseases:
> 1. Poisoning by (a) aluminum; (b) arsenic; (c) benzol or its homologues, or the derivatives of benzol, or the derivatives of homologues of benzol; (d) beryllium; (e) cadmium; (f) carbon bisulfphide or hydrogen sulphides; (g) carbon monoxide; (h) chromic acid and chromates; (i) cyanide; (j) formaldehyde; (k) fluorine, fluorides, and hydrofloric acid; (l) halogenated hydrocarbons; (m) lead; (n) manganese; (o) mercury; (p) methanol; (q) nitroglycerine; (r) oxides of nitrogen; (s) yellow phosphorus; (t) sulphur; (u) zinc. . . ."
> (Emphasis added)

The language of the statute is clear and unambiguous. There is no need to resort to rules of statutory construction. The only occupational diseases which are compensatory are those enumerated in G.S.44-5a02. This provision was in full force at the time of plaintiff's injury. Therefore, the majority was in error when it concluded that the presence of ammonia would bring this action under the Workmen's Compensation Act.

2. DID THE COURT OF APPEALS ERR IN FAILING TO VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO PLAINTIFF AND THEREFORE DENY PLAINTIFF HIS RIGHT TO A TRIAL BY JURY IN CONTRAVENTION OF THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

The 10th Circuit Court of Appeals

properly stated the standards to be applied when review is sought of a lower court's ruling on a motion for judgment notwithstanding the verdict. The evidence must be viewed in the light most favorable to the plaintiff and all reasonable inferences are to be resolved in his favor. Weeks v. Latter-Day Saints Hospital 418 F.2d, 1035 (10th Cir.). If the evidence, and the benefit of all inferences which can fairly be drawn is generally viewed in a light favorable to plaintiff and if reasonable men could come to different conclusions regarding the same, then the verdict of the jury must be allowed to stand. Brach, Sivalls, and Bryson, Inc. v. Keystone Steel Fabrication, Inc., 584 F.2d 946 (10th Cir.); Wright v. American Home Assurance Co. 488 F.2d 361 (10th Cir.). While the Court of

Appeals purports to apply these standards,they nonetheless fall short in their application of the standard to the facts of this case.

As Judge Holloway stated in his dissenting opinion, "There is ample evidence to sustain the verdict against the defendant...." The majority opinion states,

> "Thus, what does the record show as to negligence? The plaintiff put on evidence to show the physical arrangement of the work place. The machinery and the processes were described as were the windows and ventilation devices. There was shown to be heat and dust in the air. These facts were not related with but one exception to any prevailing standard or expert opinion as to particulars. No evidence whatever was introduced by the plaintiff to show the defendant's methods, practices, testing, or ventilation departed in any way from industry standards, or was contrary to expert opinion. The evidence of defendant was that this was all in accordance with practices used by prudent operators."

Assuming for the moment that plaintiff was required to relate the physical facts to prevailing standards or expert opinion, it is respectfully submitted that plaintiff more than met his burden in this regard.

Defendant's own special hazard studies disclosed that there was exposure to excess ammonia vapors, that there was a lack of make-up air in the plant, and that there was excessive fiberglas in the air at least on one date of testing. The majority opinion notes that there was evidence that fiberglas dust exceeded the threshold limit value at one or two locations in the plant, but the majority attaches no significance to this fact for reason that the threshold limit values were amended to accept a higher

figure than what the test showed. However, plaintiff requested the Court of Appeals to take judicial notice of the fact that the standard has once again been modified to its original level and therefore, the amount of fiberglas present was excessive.

Furthermore, regardless of the ultimate value chosen for the threshold limit value, defendant was aware that the value was not a fine line between safe and unsafe conditions. The recommended TLV standards warn that these levels should never be exceeded and that exposure at or below the levels may constitute a hazard to some individuals. The special hazards studies conducted by the defendant contained the following warning:

> "Because of wide variation of individual susceptibility, exposure at or even below the threshold limit value may not prevent discomfort, aggravation of pre-existing condition or occupational disease. The TLV should be used as a guide in the control of health hazards and should not be regarded as fine lines between safe and dangerous conditions."

As Justice Holloway points out in his dissenting opinion, there was evidence to indicate that the testing was conducted only in areas selected by the defendant based on observation and complaints and not on an industry standard or custom. Despite the fact that plaintiff had made complaints of the working conditions in the forehearth area, no tests of any kind were ever conducted in this area. There was further evidence that there was no industry standard

governing the frequency of testing. This in and of itself is fertile grounds for a finding of negligence.

The tests were yet deficient in another respect if the evidence is viewed in a light most favorable to plaintiff. There was testimony that testing was conducted only on "clean days" and defendants' own surveys on more than one occasion note that as many as three lines were closed on the day of testing. A reasonable inference to be drawn from this fact is that the testing was inherently inaccurate. The jury could well have reached the conclusion as it obviously did, that the frequency and location of testing was inadequate and that conducting tests on "clean days" was not prudent conduct. Obviously, if testing is to be meaningful, it must be conducted under

average working conditions.

A majority of the 10th Circuit Court of Appeals found that there was evidence to support the decision of the trial court. In their opinion, they stated as follows:

> "We will not repeat the analysis of each allegation as made by the District Court. An examination of the record supports the view of the trial court as to each point and it conforms to standards for judgment n.o.v. The record thus shows that the testing of air quality was extensive and over an extended period, reliance was properly placed on evaluations of the dangers of certain pollutants and on the opinions of experts that fiberglas particles and the numbers shown to be in the air could pose no danger."

The above passage is erroneous in two respects. First of all, it is not the duty of an appellate court when reviewing a lower court decision granting judgment notwithstanding the verdict to determine

whether there is evidence in the record to support the view of the trial court. The standard, as quoted earlier, is whether reasonable minds might differ on the conclusions to be drawn from the evidence. The Court of Appeals was required to view the evidence in the light most favorable to plaintiff. It matters not that there may have been evidence which would have supported a finding of due care on the part of the defendant, for such evidence would not be binding on a jury. Furthermore, the above statement to the effect that experts were of the opinion that the fiberglas particles in the amount shown could pose no danger is refuted by the warning contained in defendant's special hazard study. That warning clearly states that regardless of the fiberglas content found in the defen-

dant's plant, some individuals could react adversely to fiberglas in the air.

The majority opinion states, "We have again a description of the facts and circumstances but no proof or inference that what was being done was insufficient or done improperly." The inadequacy of the testing has already been discussed and the point need not be elaborated upon here. Sufficeth to say that defendant's manner and methods of testing posed a question for the jury as to their propriety, especially when viewed in light of the warning contained in defendant's special hazard studies.

The majority opinion also failed to give credence to Dr. Evans' testimony regarding the cause of plaintiff's injuries. Judge Holloway in his dissent amply points out the fallacy in the ma-

jority's reasoning. There was some impeachment of the doctor's testimony and opposing evidence. However, the opposing testimony was not conclusive on the jury and they could, if they so desired, disregard it. Furthermore, while plaintiff's physician testified that he respected the opinons of various other scholars, the fact remained that he testified that it was the combined effect of the conditions present in the plant which led to plaintiff's injuries.

It is submitted to the court that the actions of the majority of the 10th Circuit Court of Appeals have denied this plaintiff his right to a trial by a jury by substituting their own judgments and conclusions in its stead. The Seventh Amendment to the Constitution of the United States reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The trial court twice overruled defendant's motions for directed verdict prior to submitting this case to the jury. Then by opinion dated some nine months after the conclusion of the trial of this matter, the trial judge entered judgment for defendant notwithstanding the verdict. The jury found for the plaintiff; the trial judge twice overruled defendant's motions for a directed verdict when the matter was before him and his memory was fresh; and at least one justice of the Court of Appeals found that the court erred in granting judgment notwithstanding the verdict. Given these

facts, can the majority of the Court of Appeals state that reasonable minds cannot differ as to the conclusion to be reached from the evidence? It is respectfully submitted that if a three judge panel cannot reach a unanimous decision regarding the conclusions which may be drawn from the evidence that ipso facto reasonable minds may differ and the decision of the jury must be allowed to stand.

3. DID THE COURT OF APPEALS ERR IN CONCLUDING THAT PROOF OF COMPLIANCE WITH AN INDUSTRY STANDARD WAS CONCLUSIVE AS TO PROOF OF DUE CARE AND THAT PLAINTIFF COULD NOT PROVE HIS CASE WITHOUT EXPERT OPINON OR PROOF OF VIOLATION OF AN INDUSTRY STANDARD?

The majority of the Court of Appeals would hold this plaintiff to a burden of proof similar to that found in medical

malpractice actions. The majority of the court stated that, "The plaintiff failed in his proof to show that there was anything wrong, within the negligence standard with the physical facts and processes he described by his witnesses. No other method or devices were advanced as a proper solution and there was no proof as to what others in the business were doing. This is the obvious failure in his case. The picture of conditions in the plant had to be related to some standard or measure by expert opinion before a jury could reach any conclusions as to negligence." Aside from ignoring the evidence which the plaintiff produced regarding the accuracy of the tests, the method of testing, and the warning contained in the special hazard study, the court would require plaintiff to rebutt the defen-

dant's proof of due care by evidence of deviation from industry standards. The court contradicts itself by stating that adherence to a particular industry practice cannot in and of itself be taken as proof of due care. However, the court deviates from the announced rule by requiring plaintiff to prove his case by expert opinion or violation of an industry standard.

In Walker v. Colgate-Palmolive- Peet Co. 157 Kan. 170, 139 P.2d 157, The Kansas Supreme Court announced the rule to be followed where the defendant has attempted to show compliance with an industry standard as proof of due care. There the court stated,

> "... answering question 9, the jury found defendant furnished such appliances and equipment and pursued such methods of operation as were usually furnished and maintained by soap man-

ufacturing plants. While this is sometimes sufficient to relieve liability, it is not the test. The test is, did defendant use due care?' the test is reasonable care, not customary usage.' (Grammer v. Mid-Continent Petroleum Corp. 71 F.2d 38, 41 citing cases).

In Texas and Pacific Ry. Co. v. Behymer, 189 U.S. 468, 470, 23 S.Ct. 622, it was said:

'What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it ususally is complied with or not.'

In James Baird Co. v. Boyd 41 F.2d 578, 582, it was said:

'There is no need for the citation of authority to the effect that the obligation of the master to provide a safe place for his employees to work is an absolute obligation and may not be delegated to those in his employ; and, while customary methods may be considered in determing whether or not this duty has been properly performed, they do not constitute a controlling test, and it should be left to the jury to determine whether under the circumstances of the case the provisions made by the employer were such that a person of ordinary prudence would have made for the safety of his workmen.' "

The majority of the Court of Appeals erred in failing to apply the standards enunciated in Walker, supra. Walker teaches that proof of compliance with industry standards is not conclusive in determining whether or not the duty to provide a safe place to work has been performed. The issue of due care is one properly left for a jury. The standard to be applied is whether the employer made such provisions for the safety of his employees as would a person of ordinary prudence under the same circumstances. The courts of Kansas have never required a plaintiff to rebutt expert testimony with other expert testimony in order to meet his burden of proof in a negligence action, other than medical malpractice.

Despite the conclusion of the majority of the Court of Appeals, that plain-

tiff needed to prove breach of an industry standard by expert opinion to meet his burden of proof, it is respectfully submitted that the plaintiff met this burden in several regards. The reports of testing done at defendant's plant contain expert recommendations as to what should have been done to improve the situation. It was advised by an industrial hygienist from Aetna that overhead conveyors should be closed because fiberglas dust was readily seen floating through the air. Further, these same experts recommended on the two and only times that tests for ammonia were conducted, that the ammonia pump which leaked greatly excessive quanities of ammonia vapors be repaired. Measured by the standard for control of ammonia under the industry wide danger level, the exposure to ammonia was at

least 14 times greater than the recognized standard. This is a clear showing of a breach of due care.

The industrial hygiene expert for the January, 1969, test stated that there was a lack of fresh make-up air within the plant. Certainly, the jury would be entitled to draw the inference implicit in the above statement that the ventilation within the plant needed improvement.

Defendant's industrial hygiene expert, Mr. Robinson, testified that the standard determining the location of tests within the plant was employee complaints. Admittedly, that standard was shown to have been breached in the face of plaintiff's complaints about the conditions existing in the forehearth, when Mr. Robinson testified that the forehearth had never been tested for either

fiberglas dust or ammonia vapors or for the effects of the excessive heat. In fact, the forehearth area was never tested at all. Is this not a breach of a standard of practice as related by the expert Mr. Robinson?

Dr. Evans, plaintiff's medical expert, advised that a respirator should have been furnished to plaintiff to reduce the amount of fiberglas particulates and smoke from oven fires he was required to inhale. The need for this appliance was born out by plaintiff's gasping for breath, coughing, and expectoration when working in the forehearth. Furthermore, the observation of Dr. MacInnis, one of defendant's medical experts, that plaintiff should not be exposed to areas of dust or fume hazards adds fuel to the fire. With these facts in mind, the jury

was entitled to reach the conclusion that defendant failed to exercise due care in furnishing plaintiff with a respirator.

In July, 1968, the industrial hygienist advised the defendant to take steps to control the concentration of fiberglas dust. Fiberglas dust concentration was in excess of the danger level of 5 mg/m^3 on two occasions. Defendant was warned by the hygienist to control excessive exposure to fiberglas dust. The expert suggested that this could be done by removing fiberglas which clogged the exhaust system.

Another standard to determine the location of testing was where the most significant exposure to health hazards existed. In breach of this standard, the defendant did not test for fiberglas dust exposure in the area of the saws and chop-

pers on the J-4 production lines. The saws and choppers were one of the most significant sources for the creation of fiberglas dust in the plant. Furthermore, the saws and choppers on the 70 production line produced fiberglas dust in excess of the danger level, even with the use of air cleaning devices. The jury was entitled to infer that the defendant was negligent in failing to test for fiberglas dust on the J-4 saws; that such testing would have shown excessive exposure just as the testing of the 70 line saws disclosed and that the defendant failed to exercise due care to control fiberglas at both locations. Lack of due care and prudence is further shown by the defendant's failure to take any remedial steps whatsoever despite the complaints from the union safety committee about smoke,

dust, and fumes.

The overhead windows relied upon by the defendant as the main source of ventilation, were closed at least during inclement weather (Plaintiff testified that he had never noticed the windows being open). The fact that the plant was completely clouded with smoke from oven fires on a daily basis certainly shows that the oven exhaust fans were inadequate. Fans in the forehearth brought noxious, irritating fumes and dust across the plaintiff causing him to cough and gasp for breath. Pedestal fans in other areas served only to stir up fiberglas dust. These are common sense factors that need no expert opinion or testimony to be understood by the jury as being imprudent.

All of these circumstances are cogent proof that what was being done was

insufficient or done improperly. These circumstances come squarely from the standard of negligence announced in Walker, supra and satisfy plaintiff's burden of proof under Kansas law. It was not incumbent upon the 10th Circuit Court of Appeals to weigh the evidence of due care with the evidence of negligence. Rather, their sole function was to examine the evidence in a light most favorable to plaintiff and determine whether reasonable minds could differ on the conclusions to be drawn. By requiring plaintiff to prove his case by expert opinion, the majority, in effect, has given more credence to the testimony of defendant's experts than to plaintiff's witnesses, and as noted in the previous section, failed to view the evidence in a light favorable to plaintiff.

Under a similar set of circumstances the Kansas Supreme Court has stated in Miller v. Beech Aircraft Corp., 204 Kan. 184, 460 P.2d 535 at 538 (1969), as follows:

> "The record contains lay testimony of the conditions under which the plaintiff worked; of lack of proper ventilation; of long time use of fiberglass which permeated the atmosphere and worked into plaintiff's clothes and hair, nearly driving him crazy with itching and requiring daily changes of clothes and daily shampoos; of dust and other particles so thick that coffee, milk and other drinks had to be consumed as soon as poured, else they would be contaminated by "spects and spots and dust and stuff." Lay testimony also pointed to a continuing deterioration in Miller's health which commenced shortly after his exposure to such conditions.
>
> "It is our opinion that from the evidence, both lay and expert, the jury might reasonably have drawn the inference that plaintiff's disability was job-connected. We believe the trial court erred in deciding as a matter of law that the plaintiff's evidence failed to establish a causal relationship between his employment and damage to his health." Miller v. Beech Aircraft Corp., 204 Kan. 184, 460 P.2d 535 at 538 (1969).

The factual situation presented by Miller, supra, demonstrates the error in the decision of the majority. As Judge Holloway concluded his dissenting opinion, "Nevertheless, the jury was entitled to accept the testimony of the plaintiff and the doctor who treated him and to draw its conclusions from their evidence, rejecting the testimony of the defendant's experts. Thus, I cannot agree that judgment notwithstanding the jury's verdict should have been entered."

The Supreme Court of Kansas has held in numerous situations regarding the competency of a testator that an expert's opinion is not binding on the trier of fact where there is a conflict with lay

testimony. (In re Millar's Estate, 185 Kan. 510, 345 P.2d 1033, (1959); In re Robert's Estate, 192 Kan. 91, 386 P.2d 301 (1963); Matter of Carothers' Estate, 220 Kan. 437, 552 P.2d 1354 (1976). Under the law of Kansas, expert testimony is no more competent than lay testimony and the Court of Appeals erred when it accorded it greater status.

CONCLUSION

It is submitted that the foregoing arguments justify granting plaintiff's writ of certiorari. The 10th Circuit Court of Appeals has decided an important state question in a manner in conflict with the law of Kansas. The Court of Appeals, in an opinion "not designated for routine publication" has announced a standard heretofore unknown to the bench and bar of the state, to-wit: That plaintiff in a negligence action against his employer for failure to provide a safe

place to work must prove his case by expert opinion or proof of violation of industry standard before he can prevail. The above and foregoing statement has never been the law in the State of Kansas.

It is further contended that a majority of the 10th Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision. The lower court has failed to view the evidence in a light most favorable to plaintiff and engaged in weighing the evidence presented below. These are errors so blatant that citation of authorities to support them is unnecessary. They have resulted in the violation of plaintiff's constitutional right to a trial by jury.

This case cannot be re-tried in a few written pages and should not be. It

was tried to a jury and should, in the name of justice, stand as it was determined.

It is a very difficult task to reconstruct a trial from a cold record, which obviously is one reason why verdicts are not ordinarily disturbed. In actuality, the evidence showed a wanton disregard for plaintiff in the failure to test in the forehearth area for particles of ammonia, much less filter the same out of the atmosphere. This, coupled with the expert testimony of fiberglas particles overwhelming the respiratory system, certainly fits within the parameters of the negligence standards of the State of Kansas.

For these and other reasons, including the integrity of the judicial system, we respectfully request that this honor-

able court grant petitioner a writ of certiorari.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JAMES L. MURPHY,

Plaintiff,

Vs.

CIVIL ACTION
No. KC-3599

OWENS-CORNING FIBERGLAS CORPORATION,

Defendant.

Decided
December 6, 1977

MEMORANDUM AND ORDER

This case is now before the court for determination of the defendant's motion for judgment notwithstanding the jury verdict or, in the alternative, for a new trial. The jury trial of this action commenced on March 21, 1977, and was premised upon the defendant's alleged negligence in failing to provide the plaintiff, its employee, a reasonably safe place in which to work. After four days of testimony, at the conclusion of the trial, the jury

returned a verdict for the plaintiff in the amount of $275,000 -- the sum prayed for in the complaint. The defendant's motion is based upon the arguments that said verdict is wholly unsupported by substantial competent evidence and that the court erred in failing to properly instruct the jury as to the applicable law. The court has devoted much time and consideration to these arguments, and has scrutinized in great detail the transcript of the trial proceedings and the evidence found therein. This process of re-examination has led the court to conclude that the challenged verdict cannot stand and that the defendant's motion for judgment notwithstanding the verdict must, for the reasons set forth in more detail below, be sustained.

I. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

The standard to be applied in evaluating a motion for judgment n.o.v. is essentially the same as that applied in evaluating a motion for a directed verdict. See Oldenburg b. [sic] Clerk, 489 F. 2d 839 (10th Cir. 1974); Taylor v. National Trailer Convoy, Inc., 433 F.2d 569 (10th Cir. 1970); Federal Rules of Civil Procedure, Rule 50(b). In considering a motion for judgment n.o.v., the trial court is bound to view the evidence in the light most favorable to the party against whom the motion is made. E.g., Weeks v. Latter-Day Saints Hospital, 418 F. 2d 1035 (10th Cir. 1969); Gulf Insurance Company v. Kolob Corp., 404 F.2d 115 (10th Cir. 1968). The fact that the record so viewed contains a "scintilla" of evi-

dence in support of the challenged verdict -- or perhaps barely refutes a contention that there is "no" evidence supporting a party's case -- presents no legal barrier to entry of a judgment n.o.v. E.g., Yazzie v. Sullivent, 561 F.2d 183 (10th Cir. 1977); Swearngin v. Sears Roebuck & Co., 376 F.2d 637 (10th Cir. 1967). The critical question is whether the record contains evidence "upon which the jury could probably find a verdict" for the party against whom the motion is made. Yazzie, supra. Thus, while judgment n.o.v. may not be granted "unless the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made," Symons v. Mueller Co., 493 F.2d 972 (10th Cir. 1974), a motion for judgment n.o.v. should be sustained

where "the evidence and all the inferences to be drawn therefrom are so patent that minds of reasonable men could not differ as to the conclusions to be drawn therefrom" Taylor, 433 F.2d at 571-72. See also Stiner v. United States, 524 F.2d 640 (10th Cir. 1975); Bertot v. School District No. 1, Albany County, Wyo., 522 F.2d 1171 (10th Cir. 1975); Wright v. American Home Assurance Co., 488 F.2d 361 (10th Cir. 1973).

Application of these standards to the case now before us is appropriately prefaced with a brief summary of the basic facts introduced in support of the plaintiff's claim. The plaintiff James Murphy was employed in various capacities at the defendant's plant in Kansas City, Kansas, from 1959 to 1970, at which time he was disabled from further employment due to

chronic obstructive lung disease or pulmonary fibrosis -- conditions allegedly resulting from the defendant's negligent failure to provide a reasonably safe working environment. The plaintiff's theory at trial was that the airborne combination of "chemicals + dust + heat" in the Owens-Corning plant had proximately caused the disease and deterioration of his lungs. He asserted that his pulmonary disability resulted from negligence, in that the defendant had (1) failed to inspect the air in its plant and to determine the effects thereof upon its employees, including the plaintiff; (2) failed to warn or inform its employees, including the plaintiff, when it knew or should have known that the air was harmful to human beings; (3) failed to remove minute fibrous glass particles and dust from the general plant

area; (4) failed to minimize harm to its employees, including the plaintiff; (5) failed to inform plaintiff of his deteriorating condition of health in August, 1970, upon having plaintiff examined by a physician; and (6) failed to provide plaintiff with a safe place to work.

Under Kansas law, there is no question but that an employer has a duty not to expose his employees to perils and dangers against which the employer may guard by the exercise of reasonable care and that a part of this duty is to furnish a reasonably safe place in which to work. E.g., Taylor v. Hostetler, 186 Kan. 788, 352 P.2d 1042 (1960); Fishburn v. International Harvester Co., 157 Kan. 43, 138 P.2d 471 (1943). It is equally clear, however, that a master is not an insurer against all injuries which his servants

may suffer in the discharge of their duties. E.g., Uhlrig v. Shortt, 194 Kan. 68, 397 P.2d 321 (1964); Blackmore v. Auer, 187 Kan. 434, 357 P.2d 765 (1960). The Kansas Supreme Court has reiterated time and time again the legal axiom that an employer's duty to furnish safe working conditions is not absolute and that an employee's recovery for breach thereof is dependent upon proof of negligence.

In Allen v. Shell Petroleum Corp., 146 Kan. 67, 68 P.2d 651 (1937), the Kansas Supreme Court formulated the test of employer negligence as follows:

> "The master is not required to furnish the best, the safest, or the newest appliances or methods of operation, nor to adopt extraordinary or unusual safeguards against risks and dangers. The limit of his duty here is to exercise ordinary care to supply reasonably safe places, appliances, and methods. The test of his discharge of this duty is the

> exercise of ordinary care to supply such places, appliances, and methods as persons of ordinary intelligence and prudence commonly furnish in like circumstances."

Further, because under fundamental principles of tort law the risk of injury defines the duty to be obeyed, Palsgraf v. Long Island R.R.Co., 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928), the Kansas Supreme Court has held that "the master is not compelled to foresee and guard against an accident which reasonable and prudent men would not expect to happen, and where an injury to a servant could not reasonably have been anticipated, a failure to take precautionary measures is not negligence on the part of the master for which he is liable to the servant." Dodd v. Wilson & Co., Inc., 149 Kan. 605, 88 P.2d 1116 (1939). An employer

is therefore not liable for failing to anticpate idiosyncratic injury to a particular employee, arising from the employee's peculiar physical condition of which the employer had and could have no notice. Allen supra. An employer's duty does not extend to the prevention of or warning against remote, improbable, and exceptional occurrences; it is limited to such perils as reasonably are to be anticipated.

Finally, in determining the issue of employer negligence, proof of customary practices in the relevant industry is both relevant and highly probative. Because the duty of care owed by the employer is that which is exercised by the average prudent individual in similar circumstances, and because "what men ordinarily do is ordinarily prudent and careful."

Blackmore v. Auer, 187 Kan. at 442, 357 P.2d at 772, an employer will generally not be held liable if he conducts his business in a manner conforming with the usage of others engaged in the same business under similar circumstances. Uhlrig v. Shortt, supra. Evidence of customary usage in a particular business or industry is clearly not conclusive of the question of reasonable care in a given circumstance, Walker v. Colgate-Palmolive-Peet Co. 157 Kan. 170, 139 P.2d 157 (1943), for the existence of negligence in each case must depend upon the particular circumstances surrounding the parties at the time and place of the occurrences on which the controversy is based. An employee is therefore not required to prove, as a necessary element of his case, that his employer either adhered to an unreasonable

or imprudent industrywide practice or imprudently deviated from commonly acceptable customary practices. As a practical matter, however, evidence of customary practices within an industry may be among the most relevant and probative evidence available, and its absence in a case such as the one now before the court may severely impair the employee's ability to satisfy the relevant burden of proof. That burden of proof, summarized by the Kansas Supreme Court, is as follows:

> "Negligence is never presumed. It must be established by proof, but it may be shown by circumstantial evidence where the circumstances are proved and their relation to each other is such that intelligent, fair-minded triers of fact may with reason find that the negligence with which the defendants are charged has been established. To meet the burden of proof on the issue of negligence the evidence must be substantial and

> satisfy the obligation imposed upon a plaintiff in a civil action to prove such negligence by a preponderance of the evidence." Blackmore v. Auer, 187 Kan. at 440, 357 P.2d at 770.

At the conclusion of the trial of this matter, the jury was fully instructed on the substance of the law stated above. The question to be resolved is whether the jury's verdict for the plaintiff, in view of the evidence on which it was based, can be reconciled with the relevant Kansas case law. Determination of this question requires us to examine in turn the various claims of negligence on which the plaintiff's case was based.

1. The Defendant's Failure to Inspect The Air In Its Plant and to Determine the Effects Thereof Upon Its Employees.

Viewed in the light most favorable to the plaintiff, the evidence concerning

the defendant's testing and inspection procedures during the relevant period 1960 - 1970 was as follows: Commencing in 1962, the Industrial Hygiene Section of the Engineering Division of Aetna Life and Casualty Company conducted annual or biannual industrial hygiene surveys at the defendant's plant at places where,due to the particular manufacturing process involved, it was felt that there was or might be a possible occupational health hazard due to the presence of airborne chemicals or dust. In determining whether the presence of such contaminants constituted a health hazard, the inspectors from Aetna referred to the so-called "threshold limit value" (TLV) published by a respected committee of the American Conference of Governmental Industrial Hygienists (ACGIH). The TLV established by the ACGIH

committee for each particular contaminant was reviewed on a yearly basis and modified according to industrial experience and additional toxocological studies; TLV standards for humans were generally established at one tenth of the pollutant concentration level to which test animals could be exposed without suffering discernible harm. Because of this "safety factor" thus build into the TLV standards, each TLV represented conditions under which it was believed that nearly all workers could be "repeatedly exposed day after day without adverse effects." The frequency and nature of the air testing done by Aetna, as well as the procedures employed, conformed to both standard industrial hygiene procedures and procedures in effect in American industrial plants at that time. Aetna communicated to the

defendant the results of each test, together with its analysis and recommendations if warranted by the test results.

Aetna's testing was conducted in those places within the defendant's plant where it was suspected that potential health hazards existed due to proximity to particular manufacturing processes. Early tests in 1962 and 1963 were principally concerned with phenol and formaldehyde gases and dust; isolated tests for airborne fiberglas particles were not conducted because it was generally believed that such particles were "inert," i.e. even if inhaled, such particles would cause no physical or chemical reaction in the tissue of the lungs. Beginning in 1964, however, the ACGIH decided "to take a good look at fiberglas to see if there was [sic] any possible toxic effect," and

"came up with a weight figure that they felt it might be desirable to at least look at, at the time." This tenative TLV was two milligrams of airborne fiberglas dust per cubic meter of air. In 1964 or 1965, based upon industrial experience and experimental human and animal studies, the ACGIH raised the suggested TLV to 5 milligrams per cubic meter of air. By 1970, the ACGIH threshold limit committee had determined that "there was no evidence to indicate that fiberglas was a problem;" it therefore classified airborne fiberglas particles as "nuisance" dust -- one with "a long history of little adverse effect on lungs" and that did not produce "significant organic disease or toxic effect when exposures are kept under reasonable control." Upon reaching this conclusion, the ACGIH raised the TLV for

fiberglas as a nuisance dust to 15 milligrams per cubic meter of air.

With two exceptions, all tests from 1964 to 1970 indicated that the concentration of fiberglas particles in the defendant's plant were well within the TLV in effect at the time of the inspection and testing procedures. The two exceptions, in 1968 and 1969, involved test situations in the reconditioning loading area of the defendant's plant -- an area in which the plaintiff worked in 1964-65, but not thereafter. Further, in no case did a test conducted in the vicinity of the plaintiff's work station indicate that concentrations of phenol, formaldehyde, carbon monoxide, or other chemicals or airborne contaminants exceeded the respective TLV's established by the ACGIH.

The accuracy of the above-mentioned industrial hygiene studies was not ques-

tioned at the time of trial. The bulk of the plaintiff's evidence proceeded along the line that more extensive testing was called for in the circumstances. It was shown that the forehearth area in which the plaintiff worked from 1965-70 was never tested for "any and all" chemicals that might be present, or for fiberglas particles, because of Aetna's policy to inspect only those locations in which environmental health hazards seemed most probable. There was evidence that at least some of the defendant's employees felt that industrial hygiene tests were selectively conducted only when conditions in the plant were relatively "clean". There was further evidence that testing procedures might have been conducted more frequently and by arguably more accurate methods, e.g., having each employee wear

air-testing equipment at his work station throughout the course of his duties.

There would seem to be no question but that under the Kansas cases cited above, an employer is obligated to make a reasonable inspection to discover latent or concealed dangers in his place of work. What constitutes an adequate and proper inspection or test must depend on the circumstances of a particular case; an adequate inspection must, however, be such as a reasonably prudent man in the exercise of reasonable care would deem necessary under the same or similar circumstances. The court is convinced that the evidence in this regard will sustain no reasonable inference of negligence and that, to the extent the jury's verdict may have been based upon such a finding, it must be set aside. First, the defen-

dant's testing and inspection procedure was conducted in conformance with a customary and generally approved industrywide practice that was in no way suggested or shown to be insufficient or negligent. Second, there was no evidence that more frequent testing would have disclosed the existence of any danger to the plaintiff or any other employees of the defendant. Third, there was no evidence that testing at the plaintiff's individual work station would have revealed the existence of any occupational health hazard that might be reasonably anticipated by the defendant. Fourth, neither was the defendant's 30 years of experience in the fiberglas industry nor the experience of experts in the field of industrial hygiene such as to put Owens-Corning on notice as to the probable existence of an occupational

health hazard in any part of the plant where the plaintiff worked. In these circumstances, as a matter of law, the defendant could not be charged with a legal duty to employ unusual or extraordinary tests or to adopt the latest, most improved, and most extensive methods of testing and inspection. In the court's opinon, the minds of reasonable men could not differ from the view that the defendant's testing and inspection procedures were adequate and reasonable.

2. The Defendant's Failure to Warn and Inform Its Employees, Including the Plaintiff, When It Knew or Should Have Known That the Air Was Harmful to Human Beings.

Analysis of this aspect of the plaintiff's case requires us to address two distinct but interrelated questions: (1)

Was the air in the defendant's plant harmful to human beings? (2) If so, did the defendant know, or should it have been known, of the potential danger to which its employees were exposed?

Even viewing the evidence in the light most favorable to the plaintiff, it is readily apparent that the record is devoid of evidence that the air in the defendant's plant could be generally described as "harmful to human beings." All tests conducted for formaldehyde, ammonia, carbon monoxide, and fiberglas dust in situations not dissimilar from those in which the plaintiff worked established -- as we noted above -- that the contaminant levels were well within the prescribed threshold limitation values in effect at the time of the tests. The plant physican, Dr. Earl C. Sifers, testified

that in twenty years of treating the defendant's employees he had never seen a case in which the combined inhalation of chemicals and fiberglas particles caused pulmonary problems of the kind suffered by the plaintiff. General experience in the fiberglas industry, together with the information based upon experimental human and animal studies, led the ACGIH during the period in question to progressively raise its tenative TLV's for fiberglas particles and eventually to classify it as a nuisance dust producing no significant organic disease or toxic effect. Under no rational view of this overwhelming evidence could the air in the defendant's plant be deemed "harmful."

The plaintiff's only evidence to the contrary consisted of testimony by Dr. William E. Evans, M.D., to the effect that

(1) inhalation of formaldehyde vapors causes irritation to the mucous membranes of the lungs and reduces the ability of pulmonary cilia to rid the lungs of foreign materials; (2) inhalation of ammonia vapors has the same physiological effect upon the lungs; (3) inhalation of carbon monoxide gas decreases the amount of oxygen carried in the blood stream; (4) heat tends to dry the mucous membrans in the respiratory tract and reduces the ability of the cilia to remove extraneous material from the lungs; (5) lung tissues often have an allergic reaction to fiberglas particles; and (6) the combination of formaldehyde, ammonia, carbon monoxide, heat, and airborne fiberglas particles may completely overwhelm the defense mechanisms of the body and cause total physical disability. Dr. Evans' testimony was hardly

probative of the plaintiff's allegation that the air in the defendant's plant posed any general danger to human health, however, for there was no evidentiary correlation between his hypothetical medical testimony and the conditions actually existing at the defendant's plant during the relevant periods of time. Dr. Evans' testimony failed to indicate what concentration of the above-mentioned chemicals would be necessary before their deleterious effects would materialize, and he did not pretend to testify that the air in the defendant's plant exceeded such concentrations. Furthermore, his testimony openly acknowledged that the air quality in the defendant's plant was well within the threshold limit value promulgated for such contaminants by the ACGIH, a body whose expertise Dr. Evans recognized and

in whose judgment Dr. Evans had confidence. Aside from Dr. Evans' testimony, there is no evidence in the record that the air in any part of the defendant's plant in which the plaintiff was employed was generally "dangerous" to human health.

Even assuming that some such danger were present, the court could by no means accept the plaintiff's contention or the jury's possible conclusion that the defendant's failure to warn of such danger was negligent or otherwise reprehensible: the record simply supports no relational inference that the defendant knew or should have known of the existence of such danger. The plaintiff's expert witness on this subject, Dr. Evans, expressly acknowledged that the TLV standard promulgated by the ACGIH were the work of "a recognized group of experts" in the field

of industrial hygiene; that such standards represented the best judgment available on the basis of present-day scientific ability and knowledge; and that the defendant was "well justified" in relying on current standards adopted by that group. In addition to this testimony, the record contains the results of industrial health surveys that were conducted during the 1960's and early 1970's and that gave rise to a consensus of medical opinion that employees in the fiberglas industry suffered no particular risk of occupational lung disease in conditions similar to those at the defendant's plant. The plaintiff did not contend that the defendant had actual knowledge of the "danger" posed in its plant by the conditions in question. Yet, the

overwhelming weight of the scientific evidence of which the defendant might be charged with constructive knowledge pointed to the conclusion that the conditions in the defendant's plant -- which complied with contemporary industrial hygiene standards -- posed no danger to human health.

In the court's view, the evidence herein is susceptible of no rational inference that the defendant knew or should have known of any latent danger to human beings arising from the quality of the air in its plant. No reasonable person could conclude that the defendant's failure to warn of such "danger" constituted negligence or other such conduct as should properly render it liable in the circumstances. Accordingly, to the extent that the jury's verdict may have been based

upon any such finding, it must be set aside. Where there is no appearance of danger, an employer is not required to caution its employees against unexpected or improbable perils; its duty to warn is limited to such dangers as may reasonably be anticipated. Under this standard, a finding for the plaintiff must be viewed as patently unsupported by the evidence introduced at trial.

3. <u>The Defendant's Failure to Remove Minute Fibrous Glass Particles and Dust from the General Plant Area.</u>

The plaintiff's theory was that his disability was "really" caused by conditions in the forehearth area of the defendant's plant, where he worked from 1965 to 1967. According to the plaintiff, the forehearth area was a metal platform approximately 25 feet long, 18 feet wide,

suspended some 15 to 20 feet above floor level. The north end of the forehearth area was comprised of a blast furnace from which molten glass flowed into "spinners" inside large steel tanks. The crystallized molten glass was thereafter "hit" with air, which drove it down into a ring where it was sprayed with a liquid chemical binder. The product thus produced -- uncured fiberglas wool -- was then pulled down into large pits or holes in the floor. The west side of the forehearth platform was bounded by an enclosed, air-conditioned room housing various instruments relating to the forehearth production processes. The south end of the forehearth area was enclosed only by a partition over which the operator could look to the lines running beneath the platform. To the east, the forehearth area

was not enclosed; that "wall" consisted of seven large cylinders suspended at eye level over the holes in which the fiberglas wool was collected. The "ceiling" of the forehearth area is not enclosed but had various pipes "running around everywhere." In the forehearth area, according to the plaintiff, fiberglas wool accumulated all over the pipes and machinery; chemicals in the air burned his eyes, nose, and mouth; the heat in the summer months approximated 140 - 145 degrees Fahrenheit; and the air was full of dust and glass particles that were not generally visible but that produced a gritty irritation to the skin. Forehearth employees were furnished air hoses with which to blow "glass and stuff" to the floor, so that it could be swept up and discarded, but the plaintiff knew of no

air purification mechanisms or other precautions taken to ameliorate the dusty conditions in which he worked. Ventilation in the forehearth area was, in the plaintiff's view, inadequate.

Evon B. Austin, Safety Director for the defendant's plant, testified that all forehearth areas were ventilated by (1) ten rows of overhead windows 150 to 200 feet long; (2) four "schmigs" -- large floor-level apparatus that pulled from the plant's production lines 15,000 cubic feet of air per minute; and (3) two to three large "forming fans," each pulling 50,000 cubic feet of air per minute, that sucked glass into the floor-level pits described above. Austin also testified that because water was present in troughs in the forehearth area and because the fiberglas processed there was "moist and

sticky" due to spray application of chemical binders, ther were "hardly any" airborne fiberglas particles in the vicinity of the forehearth. Further, Austin testified that several machines in the defendant's plant were covered with hoods in order to collect and prevent dust in the air, and that twice a year the defendant engaged an outside firm to clean areas of the plant that the defendant's employees could not get to on a regular basis.

An employer's duty to furnish safe working conditions is not absolute, Allen v. Shell Petroleum Corp., 146 Kan. at 75, 68 P.2d at 656; it is required merely to exercise "ordinary care" to supply such a place of work as persons of ordinary intelligence and prudence commonly furnish in like circumstances. Here, any evidence that the defendant failed to conform with

commonly accepted standards of good housekeeping or industrial hygiene is conspicuously absent. The same may be said of proof that significant improvement of the air quality in the defendant's plant was technologically possible and economically feasible during the time period in question. The jury here was asked to presume the existence of negligence from the mere fact that dust and fiberglas particles were sometimes visible in the air and tended to accumulate on pipes and machinery throughout the plant.

Was the defendant negligent in failing to more nearly purify air in its plant that it believed or had reason to believe -- based upon reasonably thorough and frequent inspection and testing within its plant, the work of respected authorities in the field of industrial hygiene, and

the contemporary state of the medical sciences, as well as its experience of some 30 years in the fiberglas industry -- posed no danger to the health or well-being of its employees? We think not. First, the court has previously rejected any suggestion that "the defendant knew or in the exercise of due care should have known that the physical conditions in its plant posed a risk of danger to the health of it employees." Given merely the defendant's reasonable understanding that dust-related occupational disease among its employees were improbable at the least, and that such disease was reversible if indeed it should occur, any liability of the defendant cannot be premised upon the latter's failure to take extraordinary or unusual air purification steps. Second, there was no evidence at trial that

"cleaner" air would have prevented the onset of the plaintiff's disability. To the contrary, expert testimony strongly suggested that this particular plaintiff -- because of his history of smoking and various pulmonary problems -- accutely suffered from exposure to even minute quantities of dust and other airborne contaminants. Further, there was no evidence that absolute air purity was technologically and economically possible in the context of the defendant's manufacturing process. The plaintiff indeed made no effort to show that the air purification measures employed by the defendant were not the best available at the time.

To sustain the plaintiff's verdict on the dust control issue, the court would be compelled to apply a "white glove" test to a major industrial operation. The

dearth of evidence relating to accepted standards of industrial housekeeping and to standards technologically capable of achievement in the 1960's and early 1970's requires the court to conlude [sic] that the jury's verdict on this question must have been based upon sheer speculation. Intelligent, fair-minded triers of fact could not reasonably have found by a preponderance of the evidence that the defendant was negligent on this score. Accordingly, to the extent the jury's verdict must have rested on this ground, it must be held for naught.

4. The Defendant's Failure to Minimize Harm to Its Employees, Including the Plaintiff.

This claim, the court assumes, specifically refers to the defendant's failure to institute a program of medical check-

ups of its employees for the purpose of detecting early symptoms of pulmonary disease and dysfunction. While the evidence relating to this point is limited, it appears that the defendant's policy was to rotate employees in "high density areas" (i.e. the batch house) for mandatory periodic x-ray examinations. No such program for detecting early signs of respiratory problems existed for other employees, but the defendant's policy was to provide free chest x-rays for any employee at any time. Except for the periodic checking of "high density area" employees and the routine pre-employment examinations given to new employees, the defendant maintained no medical programs aimed at the prevention or early detection of occupational lung disease; the plant's medical clinic was principally oriented towards treating both

occupational and non-occupational illnesses or accidents at the request of affected individual employees.

For reasons similar to those discussed earlier, this limited evidence is clearly incapable of supporting an inference of negligence. The court finds as a matter of law that the defendant, acting as it did upon a reasonable belief that the working environment in its plant created no danger of occupational lung disease, was not legally obligated to conduct periodic medical examinations of all employees for the purpose of detecting the existence or onset of pulmonary disease. No evidence introduced at trial tended to establish that (1) reasonable and prudent employers in similar situations conducted or should have conducted such tests; (2) the tests medically avail-

able to the defendant would have materially heightened the defendant's awareness of pulmonary disease as an occupational hazard of its plant; or (3) such tests were capable of detecting pulmonary dysfunction at any point in which the disease was capable of treatment to reverse or mitigate a particular employee's disability. In short, no reasonable person could conclude that there existed a causal relationship between the plaintiff's disability and the defendant's failure to require mandatory physical examinations of its employees. Accordingly, to the extent that the jury's verdict may have been based upon the allegation of the defendant's negligent failure to conduct periodic mandatory physical examinations of its employees, said verdict cannot be allowed to stand.

5. <u>The Defendant's Failure to Inform Plaintiff of His Deteriorating Condition of Health in August of 1970, Upon Having Him Examined By a Physician Which it Selected.</u>

The court has some difficulty ascertaining the factual gist of this allegation. According to the plaintiff, the "real" cause of his disability was the working environment in the forehearth area where he worked "upstairs" from 1965 to 1968 and "downstairs" from 1969 to 1970. In November, 1969, the plaintiff experienced severe chest pain. The defendant's nurse referred him for x-rays. According to the plaintiff, however, he was given no treatment and he returned to work on the assurance that he was "okay." In August, 1970, the plaintiff experienced a recurrence of chest pain and again re-

ported to the defendant's medical clinic for x-rays. The plaintiff was again assured that nothing was wrong with him, and several days later he returned to work. He continued to work until October 10, 1970, when he was hospitalized by his personal physician, Dr. Evans.

According to the records of Dr. Sifers, the plant physician, the plaintiff last visited him on August 10, 1970, at which time he compalined of "just cough and cold." The plaintiff had experienced repeated attacks of bronchitis, persistent cough, and sinus drainage over the eleven years (1959-1970) that Dr. Sifers had treated him, and the doctor did not feel that hospitalization for further examination of these symptoms was warranted. There was no evidence in Dr. Sifers' records that the plaintiff had ever com-

plained that his respiratory problems were occupationally related. Dr. Florence MacInnis, the defendant's pulmonary expert at the trial of this case, compared x-rays of the defendant taken in 1969 and 1974 and concluded that the plaintiff's pulmonary fibrotic condition had remained virtually unchanged during that period.

This is not a medical malpractice case, and in the court's view this particular allegation has little or no relationship to the question of the defendant's negligence in failing to provide a reasonably safe place to work. It is sufficient for our purposes to note that there was no evidence that the medical services rendered the plaintiff by the defendant's medical clinic were deficient. Just how the defendant's "failure to in-

form the plaintiff of his deteriorating physical condition in August, 1970," might have caused or aggravated his present disability is a total mystery so far as the present record is concerned. There is certainly no suggestion that in August, 1970, the plaintiff ignored his own knowledge of "sharp chest pain" and, relying to his detriment upon the reassurances of Dr. Sifers, forsook the opportunity to obtain an independent medical opinion. Nor is there any evidence that had the plaintiff been so "informed" in August, 1970, his hospitalization in October of that year and his subsequent disability could have been avoided. In short, there appears to be no causal nexus between the defendant's failure to "inform" the plaintiff -- even assuming that it had a duty to do so -- and the

fact or the extent of the plaintiff's disability. A jury verdict to the contrary can only be viewed as incompatible with the facts and the relevant law.

6. The Defendant's Failure to Provide the Plaintiff with a Safe Place to Work.

Virtually all of the foregoing claims and the discussion thereof are subsumed in the general allegation that the defendant negligently failed to provide the plaintiff a safe place to work. While the court's previously stated views need not be reiterated, two final points merit elaboration: (1) the extremely tenuous nature of the evidence that this particular plaintiff's disability was in fact caused by the conditions in the defendant's plant; and (2) the overwhelming evidence that the plaintiff's disability, even if caused by the conditions in the

defendant's place of work, was idiosyncratic in nature.

The sole suggestion of any causal relationship between the plaintiff's place of work and his disability arose in the testimony of his personal physician, Dr. Evans. Dr. Evans testified that (1) acknowledged experts in the fields of medicine and industrial hygiene concurred in the views that (a) the chemicals in the defendant's plant were below those levels that might present a health hazard and that (b) fiberglas dust was an inert material that did not produce significant organic disease or toxic effect at the levels present in the defendant's plant; (2) such views were worthy of respect and Dr. Evans himself respected them; and (3) the defendant was entitled, in operating its plant, to rely upon such

views as representing the best information available from the medical standpoint. Notwithstanding this testimony, however, Dr. Evans concluded that the plaintiff's disability was caused by the conditions of his employment. This conclusion was substantiated exclusively by (1) Dr. Evans' personal "disagreement" (based upon undisclosed data) with the consensus of contemporary medical scientists; and (2) Dr. Evans' observation that different people have varying physical reactions to the same stimuli. In the court's view, Dr. Evans' conclusion that the plaintiff's disability was occupational is entitled to no credence or weight whatsoever. Indeed, this might truly be characterized as one of those rare cases in which "the evidence points but one way and is susceptible to no rea-

sonable inferences" that would sustain the plaintiff's burden of proof on the issue of causation.

The court need not rest its decision solely on this ground, however, for the overwhelming weight of the evidence was that the plaintiff's disability, if it was indeed related to his employment arose from his unique and peculiar susceptibility to harm. In this regard, our case is indistinguishable from Allen v. Shell Petroleum Corp. , 146 Kan. 67, 68 P.2d 651 (1937). The Kansas Supreme Court there noted that the fumes and gases in the defendant's plant were neither inherently poisonous nor present in dangerous quantities, and that no employee of the defendant -- aside from the plaintiff -- had ever suffered a lung ailment similar to that claimed by the plaintiff. The

court in Allen rendered a statement of the law that is equally applicable to the case before us: "It was not the duty of the employer to anticipate a particular injury to an employee which very likely resulted by reason of the employee's peculiar physical condition, of which it had or could have had no notice." Here, as in Allen, the plaintiff's disability was neither foreseen nor reasonably foreseeable by the defendant, and the court cannot hold the defendant strictly liable for its failure to guard against or to prevent disability that a reasonable and prudent employer would not expect to happen. The court must therefore hold that the finding inherent in the jury's verdict -- i.e. that the defendant negligently furnished the plaintiff an unsafe place in which to work -- is absolutely unsup-

ported by the overwhelming evidence in this case.

This case is in many ways analogous to Robbins v. Alberto-Culver Co., 210 Kan. 147, 499 P.2d 1080 (1972), involving the alleged breach by a hair rinse manufacturer of an implied warranty that its product was suited and fit for the purpose for which it was sold. The Kansas Supreme Court, in defining the proper standard to be followed in ascertaining the manufacturer's liability for personal injuries occasioned by its products to persons who were allergic or hypersensitive to their use, made the following comments:

> "At the risk of seeming over-simplistic, we believe the concept of foreseeability is the key in determining liability on the part of one who manufactures or sells a fabricated product which causes an allergic reaction in a person who may be susceptible to it."

The Kansas Supreme Court therefore found in the implied warranty context that a manufacturer is not required "to assume the role of absolute insurer against physiological idiosyncrasy," or rendered liable for an isolated instance of personal injury to "an unusually susceptible individual," unless such injuries "ought reasonably to have been foreseen by a person of ordinary care in an appreciable number of persons in light of the attending circumstances." The compelling logic and inherent justice of this rule is equally applicable in the negligence case now before the court. To susatin the jury's verdict absent proof of reasonable foreseeability of the plaintiff's injuries would be to render the defendant here an insurer strictly liable for unexpected

injuries arising from the peculiar idiosyncrasies and allergic predispositions of the plaintiff. Such a result would be consistent with neither the prevailing law nor the court's sense of fundamental justice. See also, Ray v. J.C. Penney Co., 274 F.2d 519 (10th Cir. 1959).

6. Conclusion.

For all the reasons stated above, the court finds that the defendant is entitled to prevail on its motion for judgment notwithstanding the verdict. This conclusion does not end the pertinent inquiry, however, for under Rule 50(c)(1) of the Federal Rules of Civil Procedure the court is also required to rule on the defendant's motion for a new trial, determining whether it should be granted if the judgment notwithstanding the verdict is thereafter vacated or reversed. It is

to that question that the court now turns.

II. MOTION FOR NEW TRIAL.

The defendant argued at various points in the trial that the plaintiff's exclusive remedy, if any, was under the following provisions of the Kansas Workmen's Compensation Act:

> "K.S.A. §44-5a01. Occupational disease by accident, when; provisions of workmen's compensation law applicable. (a) where the employer and employee or workman are subject by law or election to the provisions of the workmen's compensation law, the disablement or death of an employee or workman resulting from an occupational disease as hereinafter listed and defined shall be treated as the happening of an injury by accident, and the employee or workman . . . shall be entitled to compensation as provided in the workmen's compensation law except as hereinafter otherwise provided....
>
> (b) Where an occupational disease is aggravated by another disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, but [sic] is aggravated, prolonged, accelerated or in any wise contributed to by an occupational disease, the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease, as a causative factor, bears to all the causes of such disability or death...."
>
> "K.S.A. §44-5a02. Compensable occupational diseases. The following diseases only shall be deemed to be compensable occupational diseases:
>
> "1. Poisoning by . . . (g) carbon monoxide; . . . (j) formaldehyde . . . ."

Based upon these statutes, as well as the plaintiff's theory that the synergistic reaction in the plaintiff's lungs of "chemicals" (formaldehyde, ammonia, and carbon monoxide) plus "heat" (from the blast furniace in the forehearth area) plus "dust" (airborne fiberglas particles) had caused the disability complained of, the defendant requested that the court instruct the jury as follows: "You, the

jury, are not permitted to return a verdict in favor of the plaintiff in this case for any damages, if any, you find which may have been caused by formaldehyde or phenol or carbon monoxide." The court rejected the proffered instruction on two grounds: first, the defendant had failed to sufficiently show that the plaintiff's disability was caused by "poisoning" as that term was used in K.S.A. §44-5a02; and second, that the defendant had failed to submit any evidence on which the jury could properly apportion the plaintiff's damages, if any.

Upon reviewing the record in this case in light of several Kansas cases defining "poisoning," the court is persuaded that its prior view of the evidence was overly restrictive, and that the jury should have been instructed to decide whether any of the plaintiff's disability arose from occupational "poisoning" and was thus within the exclusive purview of the Kansas Workmen's Compensation Act. As early as 1886 the Kansas Supreme Court observed that the word "poison" is "in common use in our language, [has] a well-settled meaning which is not local, and cannot be regarded as technical or peculiar." In State v. Baldwin, 36 Kan. 1 (1886), the court therefore held that, so far as the definition of "poison" was concerned, it was "proper for the court to aid and enlighten the jury by defining the words and giving their usual meaning and acceptation in common language." The court further approved use of the following dictionary definitions of "poison:" (1) any substance which, when introduced into the animal organization, is capable

of producing morbid, noxious, or deadly effect upon it; and (2) any substance which, introduced in small quantities in the animal economy, seriously disturbs or destroys the vital functions. It was further noted that there are "many different modes in which poisons operate," and that included under the heading of "poisons" are "obviously . . . a vast number of bodies belongong to the mineral, vegetable, and animal kingdoms, some solid, others fluid, and other gaseous, and deleterious vapors and miasmata imperceptible to the sense." 36 Kan. at 20-21. A similar approach to the definition of "poisoning" in a workmen's compensation context was expressly condoned by the Kansas Supreme Court in Weimer v. Sauder Tank Company, 184 Kan. 422, 337 P.2d 672 (1959). Accordingly, the jury in this case

should have been informed of the substance of the relevant occupational disease statutes and instructed to determine whether any part of the plaintiff's disability was attributable to "poisoning" for which K.S.A. §44-5a01 provided the exclusive remedy.

The principal reason why the court refused to give the defendant's proffered instruction was not its concern whether the plaintiff's disability was arguably due to "poisoning" under the relevant statute, but rather its concern that the defendant had presented absolutely no evidence on which the jury could rationally apportion the plaintiff's damages, if any, as to recovery for injury within and injury outside the scope of the Workmen's Compensation Act. The defendant -- which relied entierly upon the proposition that

the plaintiff's disability was 100% non-occupational in origin -- presented no evidence from which the jury could find that among those occupational causes (if any) of the plaintiff's disability, any particular percentage of his difficulties could be attributed to "poisons" within the scope of the occupational disease statutes as opposed to other substances for which statutory compensation was not available.

In retrospect, the court is of the opinion that this failure of proof did not warrant its refusal to instruct the jury as to the arguable applicability of the exclusive remedial provisions of the workmen's compensation statute. The entire theory of the plaintiff's case at trial was that the synergistic reaction of "chemicals + heat + dust" produced the

pulmonary disability for which relief was sought. The plaintiff disavowed the suggestion that any single component of this formula, or any combination of two such components, produced or could have produced the plaintiff's disability. With reference to the "chemical" component of his theory, however, the plaintiff's own evidence established a virtually prima facie case that (1) his disability was partially attributable to §44-5a02 chemicals; and (2) the effect of such chemicals was "poisonous" in nature. In view of this evidence, which made out a prima facie case that the plaintiff's common law remedy was completely -- or at best, partially -- barred by the availability of workmen's compensation relief, it was incumbent upon the plaintiff to establish the nonexclusivity of the statutory compensation remedy

as to each element of the injuries for which he sought common law relief. The defendant's requested instruction did not introduce as an "affirmative defense" the issue of §5a01(b) [sic] apportionment as to the "heat" and "dust" elements of the plaintiff's theory. This issue was interjected into the case by the plaintiff himself. The defendant appeared willing, so far as the "heat" and "dust" facets of the plaintiff's case were concerned, to rest upon the court's basic jury instructions that in order for defendant to be found liable, the plaintiff must prove negligence, causation, foreseeability of injury, etc. Accordingly, the defendant should not have been required, as a condition precedent to the giving of its proffered jury instruction, to introduce evidence purporting to assign a certain per-

centage of the plaintiff's disability to causes for which K.S.A. §§44-5a01 and 44-5a02 provided the exclusive remedy.

In deciding to conditionally sustain the defendant's motion for a new trial, in the event that the court's order granting the defendant's motion for judgment notwithstanding the verdict should be reversed upon appeal, the court does not mean to imply that the particular instruction proffered by the defendant adequately addressed all of the points that the court in retrospect feels should have been covered. The court merely holds that based upon the evidence in this case the jury should have been instructed (1) to determine to what degree, if any, the plaintiff's disability was caused by chemical "poisoning" within the purview of K.S.A. §44-5a02(g) or (j); and (2) to determine

to what degree, if any, the plaintiff's disability was caused by conditions or substances beyond the scope of K.S.A. §§44-5a01 and 44-5a02. The jury should have been further instructed, if it found the plaintiff's disability to have been caused by both compensable and noncompensable factors, to render an appropriate apportioned verdict under K.S.A. §44-5a01 (b). As to the latter point, the jury should have been instructed as to who bore the burden of proving facts on which a rational apportioned verdict could be rendered.

It is perhaps appropriate to comment in closing upon the fact that in deciding the defendant's motion for judgment notwithstanding the verdict, the court did not rely upon the defendant's argument that all recovery whatever was barred by

the availability of relief under the provisions of the Workmen's Compenation Act. In the court's view, it was not necesary to reach this issue, which is essentially a matter of affirmative defense, because of the total paucity of evidence probative of the basic elements of the plaintiff's case. If the court's evaluation of that evidence is in error and should its conclusion be reversed upon appeal, however, the court would be required to find that adjudication of the plaintiff's rights at common law vis-a-vis the exclusive remedial provisions of the Kansas Workmen's Compensation Act is properly a matter of jury determination under appropriate instructions.

IT IS THEREFORE ORDERED that the defendant's motion for judgment notwithstanding the verdict be and hereby is sus-

tained, and that the defendant's motion for new trial be and hereby is conditionally granted in the event that the judgment to be subsequently entered in this case is hereafter vacated or reversed. Counsel for the defendant shall prepare, circulate, and submit for the court's approval and signature a Journal Entry of Judgment reflecting the holdings of the foregoing Memorandum and Order.

Dated this 6th day of November, 1977, at Kansas City, Kansas.

/S/ EARL E. O'CONNOR

UNITED STATES DISTRICT JUDGE

Not for Routine Publication

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 78-1082

JAMES L. MURPHY,

Appellant

Vs.

OWENS-CORNING FIBER-GLAS CORPORATION,

Appellee

Appeal From the United States District Court For The District of Kansas

Decided July 13, 1979

Lloyd Burke Bronston and Dan L. Smith, Overland Park, Kansas, for Appellant.

Leonard O. Thomas, Kansas City, Kansas (Charles O. Thomas and James R. Callahan, Kansas City, Kansas, and Weeks, Thomas, Lysaught, Bingham & Mustain, Chartered, Kansas City, Kansas, of Counsel, with him on the Brief), for Appellee.

Before SETH, Chief Judge, HOLLOWAY and LOGAN, Circuit Judges.

SETH, Chief Judge.

Plaintiff brought this diversity action in Kansas, alleging that he had a serious lung condition which was caused by defendant's failure to provide a safe place to work at its fiberglass plant while plaintiff was there employed. The case was tried to a jury which returned a verdict for plaintiff. In response to defendant's motion, the trial court entered a judgment for defendant n.o.v. The plaintiff has taken this appeal.

The trial court in its detailed memorandum on the motion for judgment notwithstanding the verdict states the standard to be applied in the examination of the evidence on such a motion. We agree with the statement, and further are of the opinion that the trial court properly applied the standard.

Thus the evidence here must be viewed in the light most favorable to the plaintiff, and all reasonable inferences are for the plaintiff. Weeks v. Latter-Day Saints Hospital, 418 F.2d 1035 (10th Cir.). A scintilla of evidence is not enough to support plaintiff's position. McGhee v. Draper, 564 F.2d 902 (10th Cir.); Yazzie v. Sullivent, 561 F.2d 183 (10th Cir.). If the benefit of inferences is given to this plaintiff, and the evidence generally viewed in a light favorable to him, and still if reasonable men could not come to a different conclusion, the ruling must go with such conclusion. Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication, Inc., 584 F.2d 946 (10th Cir.); Wright v. American Home Assurance Co., 488 F.2d 361 (10th Cir.); Taylor v. National Trailer Convoy, Inc.,

433 F.2d 569 (10th Cir.). We thus apply these standards in the examination of the record.

We will not discuss the facts at length. The trial court's memorandum contains a statement of the basic facts which we consider to be supported by the record.

It is apparent that under Kansas law, the defendant was to provide the plaintiff a safe place to work. See Uhlrig v. Shortt, 397 P.2d 321 (Kan.). The plaintiff alleged that the defendant was negligent in several particulars and recognized that negligence of the defendant was an essential ingredient of his cause of action. Allen v. Shell Petroleum Corp., 68 P.2d 651 (Kan.); Lane v. Missouri Pacific Ry. Co., 68 Pac. 626 (Kan.). Thus the standard of ordinary

care as the Kansas court said in Allen v. Shell is: ". . . To supply appliances, methods, and places as persons of ordinary intelligence and prudence commonly furnish in like circumstances." As the trial court stated, a standard is the degree of care exercised by an average prudent person in similar circumstances, and further, " . . . an employer will generally not be held liable if he conducts his business in a manner conforming with the usage of others engaged in the same business under similar circumstances," citing Uhlrig v. Shortt.

Thus what does the record show as to negligence? The plaintiff put on evidence to show the physical arrangement of the work place. The machinery and the processes were described as were the windows and ventilation devices. There was

shown to be heat and dust in the air. These facts were not related, with but one exception, to any prevailing standard or expert opinion as to particulars. No evidence whatever was introduced by the plaintiff to show that the defendant's methods, practices, testing, or ventilation departed in any way from industry standards, or was contrary to expert opinion. The evidence of defendant was that this was all in accordance with practices used by prudent operators.

The "exception" referred to above was a showing that the dust at one or two locations in the plant exceeded a certain figure which was then above an accepted standard. However, the standard was within a very short time thereafter changed to accept a very much higher figure than the test showed. There can be no signifi-

cance to this testing since it was well within the standard ultimately adopted.

The plaintiff failed in his proof to show that there was anything wrong, within the negligence standard, with the physical facts and processes he described by his witnesses. No other method or devices were advance as a proper solution, and there was no proof as to what others in the business were doing. This is the obvious failure in his case. The picture of conditions in the plant had to be related to some standard or measure by expert opinion before a jury could reach any conclusions as to negligence.

It is obvious that adherence to a particular industry practice cannot in itself be taken as proof of due care. There is such a great variety of situations and circumstances. See Walker v.

Colgate-Palmolive-Peet Co., 139 P.2d 157 (Kan.). There must however be proof of facts or clear circumstantial evidence, taken in proper context, to demonstrate for the jury that a defendant has departed from an accepted standard of care, or expert opinion, if the plaintiff is to meet his burden. The court in Blackmore v. Auer, 357 P.2d 765 (Kan.), said in part:

> "To meet the burden of proof on the issue of negligence the evidence must be substantial and satisfy the obligation . . . to prove such negligence by a preponderance of the evidence."

Taking all the inferences, and the best view of the facts for plaintiff, the failure of plaintiff to come forward with facts to demonstrate that the circumstances shown to exist met plaintiff's burden under Kansas case law is apparent.

The trial court in its memorandum, from which we have borrowed liberally,

considers separately each allegation of negligence and relates it to the proof. Thus it considers the allegation of failure to test the air quality and to determine the effects on the employees, the failure to warn employees that the air was harmful, the failure to remove dust and particles, the failure to warn plaintiff of his deteriorating health. We will not repeat the analysis of each allegation as made by the district court. An examination of the record supports the view of the trial court as to each point, and it conforms to standards for judgment n.o.v. The record thus shows that the testing of air quality was extensive and over an extended period, reliance was properly placed on evaluations of the dangers of certain pollutants, and on the opinions of experts that fiberglass par-

ticles in the numbers shown to be in the air could pose no danger. There was no proof otherwise, and again no expert opinion or practice to demonstrate anything was wrong. In short there was no proof or inference that anything else should have been done or more done upon which the jury could conclude that the defendant was negligent as to any of the particulars recited above. We have again a description of the facts and circumstances, but no proof or inference that what was being done was insufficient or done improperly. There was no evidence or inference that other or more frequent testing would have led to any different results.

In an application of the judgment n.o.v. standard, there was no evidence from which the jury could reach any other

conclusion than plaintiff's lung condition had no connection with his employment. Dr. Evans appeared as a witness for plaintiff as to his medical condition. The doctor agreed with the several articles written by recognized experts relating to studies of the health and lung conditions of fiberglass workers. These studies showed in substance that lung conditions of fiberglass workers were no different than other workers. Dr. Evans agreed with the standards. There were no facts advance by Dr. Evans nor were there any facts in the record on which he could base his opinion as to a causal connection. He acknowledged that the air quality was within the limits or standards he recognized as valid. An expert opinion without any basis in fact, or related to any fact before the court, is not an ex-

pert opinion and is not evidence for any purpose. The trial court in excluding the statements by Dr. Evans said: "Indeed, this might truly be characterized as one of those rare cases in which 'the evidence points but one way and is susceptible to no reasonable inferences' that would sustain the plaintiff's burden of proof on the issue of causation." The medical witnesses of defendant testified there was no connection between plaintiff's condition and his employment. This was the only evidence on the issue.

There would seem to be no purpose in discussing the matter of ammonia and other vapors in the area where plaintiff worked. This point is argued on appeal, but there is no record support other than the most general reference. In any event, the argument leads to the conclusion that

this element or the whole case by the addition of this element brings the claim under the Kansas statutes (K.S.A. § 44-5a02) relating to workmen's compensation relating to poisoning.

We have considered the several other points raised by plaintiff, but find them to be without merit. Thus we must conclude that the entry of the judgment notwithstanding the verdict was proper, and it is affirmed.

No. 78-1082

MURPHY v. OWENS-CORNING FIBERGLAS CORPORATION

HOLLOWAY, Circuit Judge, dissenting:

August 17, 1979

I respectfully dissent.

Under the standards we must apply in deciding whether a party should be de-

prived of a jury verdict in his favor, I must disagree with the majority. To sustain the judgment n.o.v. considerable reliance is placed on evidence of compliance by the defendant with some industry standards. However, the Kansas Supreme Court has held in connection with the employer's duty to provide a safe place to work that the duty is an absolute obligation, not to be delegated to those in his employ; that while customary methods may be considered in determining whether the duty has been properly performed, "they do not constitute a controlling test, and it should be left to the jury to determine whether, under the circumstances of the case, the provisions made by the employer were such as a person of ordinary prudence would have made for the safety of his workmen." Walker v. Colgate-

Palmolive-Peet Co., 139 P.2d 157, 173 (Kan.), quoting James Baird Co. v. Boyd, 41 F.2d 578, 582-83 (4th Cir.).

There is ample evidence to sustain a verdict against the defendant under this standard, in my opinion. The evidence showed heat in areas where the plaintiff worked at some 120 to 140 degrees and the presence of varyng levels of fiberglas particles, ammonia, carbon monoxide and formaldehyde and complaints by the plaintiff about the conditions. While the concentrations of individual substances were below some recognized danger levels, the jury was entitled to take into account the combined effect of the conditions on the plaintiff's lungs and their capacity to tolerate fiberglas particles. It was this synergistic effect which the plaintiff's doctor testified about, as noted below. To me the proof

of the conditions and of the defendant's knowledge of them was sufficient to sustain the jury's verdict.[1] We have held that a judgment n.o.v. cannot be granted unless the evidence, viewed in the light most favorable to the plaintiff, together with inferences which may fairly be drawn therefrom, points all one way and is susceptible of no reasonable inferences sustaining the plaintiff's position. Moore v. Shultz, 491 F.2d 294, 298 (10th Cir.). That strict test was not met here.

It is also argued that the evidence was defective as to causation or connec-

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[1] As noted above, the plaintiff testified to the presence of fiberglas dust and chemical fumes in the air, as well as the extreme heat in his working area. While the majority emphasizes that the defendant complied with industry practices in testing for substances, and in ventilation and control of these subs-

tances, there was evidence to indicate that testing was conducted only in areas specified by the defendant, and in fact, the plaintiff's work area was not tested for all of these substances.

Further evidence showed that location and frequency of testing were not governed by industry standards but by the individual company, and thus the jury could reasonably have determined that the defendant was negligent in not testing frequently enough and in proper locations, even if the tests used were accurate tests. Evidence by the plaintiff and others as to the condition of his work area and evidence of complaints made to the defendant by the plaintiff could lead to the jury's concluding that defendant was negligent in not testing the plaintiff's work area.

There was also evidence to indicate that what ventilation methods were used by the defendant, such as overhead windows, were often not used in inclement weather. From this the jury could conclude that chemicals and fiberglas dust were at higher concentrations on days when defendant was not using all existing ventilation.

Finally, some evidence indicated that certain ventilation devices may have served to aggravate the problem by stirring up fiberglas particles and by blowing chemical vapors into the plaintiff's work area. From this the jury could also infer defendant was negligent in not providing safe working conditions.

tion of the plaintiff's disability with his employment. However, his testimony showed he was in good health on commencing work with defendant in 1959 at 28 years of age, and that he worked in defendant's plant until he became disabled in 1970. His own treating physician testified on the basis of plaintiff's medical history and tests made during two weeks of hospitalization of plaintiff in late 1970, and from reports and recommendations on conditions in defendant's plant. From all the circumstances this physician testified that the plaintiff had chronic obstructive pulmonary disease, that he had no doubt this was due to the heat and the amount of materials plaintiff had inhaled, that the mechanism of the body trying to overcome these things was "overwhelmed," and that in his medical opinion,

the plaintiff was "completely and totally disabled by this employment." (4 R. 249-50). The doctor had earlier stated his opinion that the plaintiff was permanently and totally disabled. (Id. at 226). He explained in detail how the heat and its drying effect and the inhalation of other materials impaired the functioning of the cilia and the ability to dispose of other foreign matter, such as fiberglas (Id. at 236-39, 244-47).[2]

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[2] The majority opinion, p.6, refers to the trial court's "excluding" the statements of Dr. Evans. I assume this is said in the sense that in his post-trial memorandum, 447 F.Supp. at 569, the trial judge said that the doctor's conclusion "is entitled to no credence and weight whatever." I find no statement in the record where the testimony of Dr. Evans on causation or any other substantial part of his testimony was excluded or stricken.

We should take into account all this testimony from the treating physician and from the plaintiff himself. As the Kansas Court has done, we should consider "lay testimony of the conditions under which the plaintiff worked; of lack of proper ventilation; of long time use of fiberglass which permeated the atmosphere..." Miller v. Beech Aircraft Corporation, 460 P.2d 535, 538 (Kan.). From such evidence, "both lay and expert, the jury might reasonably have drawn the inference that plaintiff's disability was job-connected." (Id. at 538).

It is true that there was considerable impeachment of the doctor's testimony and opposing evidence. The trial court's memorandum opinion states plausible reasons for reaching a contrary result. Nevertheless, the jury was entitl-

ed to accept the testimony of the plaintiff and the doctor who treated him and to draw its conclusions from their evidence, rejecting the testimony of the defendant's experts. Thus I cannot agree that judgment notwithstanding the jury's verdict should have been entered.

JAMES L. MURPHY,

Plaintiff-Appellant,

Vs.

No. 78-1082
September Term -
October 5, 1979

OWENS-CORNING FIBERGLAS CORPORATION,

Defendant-Appellee.

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc filed by appellant.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Seth and Circuit Judge Logan. Circuit Judge Holloway voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc,

Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

By Robert L. Hoecker
Chief Deputy Clerk